IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1248 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

JASVANT RAYCHANBHAI THAKKAR

Versus

STATE OF GUJARAT

Appearance:

M/S THAKKAR ASSOC. for Petitioner

MR HL JANI ASSTT GOVT PLEADER for Respondent No. 1

MS PJ DAVAWALA for Respondent No. 4

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 14/06/2001

ORAL JUDGEMENT

#. Heard Mr.D.M.Thakkar, learned advocate appearing on behalf of the petitioner and Mr.H.L.Jani, learned AGP on behalf of the respondent Nos.1 to 3 - State authority

and Ms.P.J.Dawawala, learned Additional Standing Counsel for the Central Government appearing on behalf of the respondent No.4.

#. In the present petition, the petitioner has challenged the order of detention dated 23rd February, 2000 actually executed on 19th January, 2001 passed under the provisions of PBM Act and the petitioner has been detained as prisoner as Class-II detenu in Junagadh District Jail. The grounds of detention has been communicated to the present petitioner. The respondent State of Gujarat has filed affidavit in reply through one Mr.P.G.Vyas, Deputy Secretary to the Government of Gujarat, Food, Civil Supply and Consumer Affairs Department dated 11th April, 2001. The respondent No.4 has also filed affidavit through one Mr.S.L.Meena, Under Secretary in the Department of Consumer Affairs, Ministry of Consumer Affairs, Food and Public Distribution, New Delhi. Both these affidavits are taken on record.

#. Learned advocate Mr.Deepak Thakkar has challenged the detention order on the ground that at the time of passing the detention order, the detaining authority has not considered alternative remedy meaning thereby less drastic remedy while passing the detention order against the present petitioner. Learned advocate Mr.Deepak Thakkar has also submitted that the detaining authority has not applied its mind and completely ignored the relevant provisions while passing the detention order and did not keep in mind the alternative less drastic remedy which was available to the detaining authority before passing the detention order against the present petitioner. The second contention raised by the learned advocate that looking the grounds of detention - page-19, the detaining authority has considered the relevant provisions of Section 12 [AA] of the Act of 1955 which relating to the jurisdiction of the special court. Mr.Thakkar, learned advocate has also submitted that the powers and jurisdiction of the special court in respect of Act, 1955 has not been further extended after the year 1998 and therefore, it amounts to consideration of relevant provisions of Section 12[AA] which is not at all in existence, is clear non application of mind of the detaining authority while passing the detention order against the present petitioner. Learned advocate Mr.Thakkar has also relied upon decision reported in 1998 GLR page 710 in case of HARSUKHBHAI HANSARAJBHAI KACHHADIYA VS. UNION OF INDIA and 1999 (1) GLH page 145 in case of U.I.JOSHI VS. DISTRICT MAGISTRATE NAVSARI . Learned advocate Mr.Thakkar has also submitted that there are alternative remedies available to the detaining

authority before taking harsh steps against the present petitioner of detention to cancel the licence or to suspend the licence under the provisions of the Act but same were not considered by the detaining authority while passing the detention order and thus, the detention order requires to be quashed and set aside.

#. Learned AGP Mr.H.L.Jani appearing on behalf of the respondent - State has submitted that the detaining authority has considered the lesser drastic remedy of having alternative before passing the detention order against present petitioner on page-19 and the detaining authority has applied its mind and given due consideration and therefore the order of detention does not warrant any interference of this Court. Learned AGP Mr.H.L.Jani has read over the entire grounds of detention before this Court and pointed out there was malpractice committed by the petitioner by transferring the solvent to the dealers of petrol and diesel rather than supply the solvent for the use of industrial purpose. Such activities of the present petitioner has ultimately affected adversely to the public as well as economy of the State and therefore it violated the relevant provisions of supply of Essential Commodities Act. Therefore, according to the learned AGP Mr.Jani, the detaining authority has rightly passed the detention order after considering all the relevant aspects which required to be taken into consideration and there was no defect in the detention order. Mr.Jani, learned AGP has also relied upon the decision of the Division Bench of this Court in case of P.N. KHEMANI VS. STATE reported in 1985 (2) GLR pg 485.

#. Learned advocate Ms.P.J.Dawawala appearing on behalf of the respondent No.4 has submitted that the detention order is just and proper.

#. I have considered the submissions made by all the respective advocates for the parties. However, one aspect is clear and there is no dispute about settled legal position which has been held by the division bench of this Court in reported decision of 1985 (2) GLR page 485 that alternative remedy no bar to preventive detention but it is necessary for the detaining authority or the detaining authority bound to consider such aspects at the time of passing the detention order. This view has also been taken by this Court in case reported in 1998 GLR pg 710 that alternative action could have been to cancel his licence, authority not found to have weighed the pros and cons of such alternative action, detention order is required to be quashed. Similarly, in a recent decision reported in 1999 (1) GLH 145, the

learned Single Judge of this Court has considered very relevant aspect that subjective satisfaction of the detaining authority while passing the detention order when detaining authority was not aware of the aspect that the suspension or cancellation of licence would not be an effective remedy, in preventing the alleged anti social activities of the detenu, then subjective satisfaction of the detaining authority is vitiated. In light of these three decisions of this Court and looking to the grounds of detention at page 19, the detaining authority has not applied opinion in respect of having alternative remedy of lesser drastic remedy to cancel or suspend the licence of the present petitioner for restraining the petitioner from indulging into similar kind of the activities. But the detaining authority has not applied its mind and even the detaining authority has not discussed the same in the grounds of detention to the effect that cancellation or suspending of licence is not an effective remedy available to the detaining authority. Though Mr.H.L.Jani, learned AGP has relied upon para-10 of the reply which is on page 41 and supported his contention that the detaining authority has considered the alternative remedy available to the detaining authority before passing the detention order and that remedy is not found effective and therefore, the detaining authority has passed the detention order. I have gone through para-10 of the reply filed by the respondent - State but in Para-10, no such averments is made by the respondent State that before passing the detention order, the detaining authority has applied its mind for resorting to availing alternative remedy of cancelling or suspending the licence possessed by the petitioner. However, as such no averments to that effect nor any explanation has been given by the respondent State in para-10. Therefore, considering this aspect that it is necessary for the detaining authority to consider the important aspect before passing the detention order to the effect that cancelling or suspending licence of the present petitioner. But this aspect has not at all been considered specifically by the detaining authority and the detaining authority has not applied its mind and therefore, the order of detention, according to my mind, is vitiated. However, even according to the second contention which has been raised by the learned advocate Mr.Thakkar that relevant provisions of Section 12[AA] of the Act, 1955 which was not at all in existence at the time of passing the detention order in statute book but despite this fact, the detaining authority has considered the said provisions of Section 12[AA] and therefore, it apparently non application of mind by the detaining authority. Against this submission, learned AGP

Mr.H.L.Jani has not answered and does not offer any comment because apparently this provision of Section 12 [AA] has not been further extended after 1998 in respect of powers and jurisdiction of Special Court. This fact has not been disputed by the learned AGP Mr.Jani and therefore at the time of passing the detention order, this relevant provisions of Section 12 [AA] was not at all in existence referred to in the grounds of detention while passing the detention order, which is clear non application of mind apparently on the face of record and therefore, even on second ground and contention, the detention order is also required to be quashed and vitiated.

#. Considering all these aspects of the matter and after considering three decisions of this Court so also looking tot he facts and circumstances of the case, the detaining authority has failed to prove that lesser drastic alternative remedy of cancelling and / or suspending the licence of the present petitioner before passing the detention order has been considered and even relevant provisions of Section 12 [AA] which was not at all in existence after 1998, is clear non application of mind and therefore according to my opinion, the order of detention is vitiated and the same is required to be quashed and set aside.

#. For the reasons recorded hereinabove, the petition succeeds and the same is allowed. The order of detention dated 23rd February, 2000 actually executed on 19th January, 2001 is vitiated and resulted to quash and set aside. The detenu - JASVANT RAYCHANBHAI THAKKAR who has been detained at Junagadh District Jail be set at

liberty forthwith if he is not required in any other case. Rule is made absolute accordingly. No order as to costs. Direct Service is permitted.

Date : 14-6-2001 [H.K.Rathod, J.]

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